No. 22297

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RALPH WILMOT, Counsel for the General Counsel of the National Labor Relations Board,

Appellant,

v.

DAVID DOYLE, National Labor Relations Board Trial Examiner on relation of LOCAL 959 OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, INDEPENDENT, and GROCERS WHOLESALE, INC.,

Appellees,

and

RALPH WILMOT, in his individual capacity,

Intervenor.

ON APPEAL FROM ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

BRIEF FOR THE APPELLANT

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

SOLOMON I. HIRSH,
WILLIAM H. CARDER,
Attorneys,
National Labor Relations Board.

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INDEX

AUTHORITIES CITED

Cases:

Cases -- Continued

Cases -- Continued

Statutes:

Miscellaneous:

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STATEMENT OF JURISDICTION

This is an appeal from an order (R. 67)[1/] of the United States District Court for the District of Alaska granting appellees' petition for enforcement of a subpena duces tecum issued by the National Labor Relations Board and directed to Ralph Wilmot, as counsel for the General Counsel

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1/ References to those portions of the record printed in Volume I of the Transcript of Record are designated "R." Refererences to the transcript of the hearing before the District Court are designated "Tr."

of the National Labor Relations Board. Appeal is also taken from the District Court's subsequent order (R. 71-72) adjudging Wilmot to be in civil contempt for failing to comply with the order enforcing subpena. The jurisdiction of the District Court was invoked under Section 11(2) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.), 28 U.S.C. 1337, and 28 U.S.C. 1361.[2/] The jurisdiction of this Court is invoked under 28 U.S.C. 1291 and 1294.

STATEMENT OF THE CASE

A. Proceedings before the Board

On April 17, 1967, on the basis of charges filed by several individuals, the Regional Director for the Board's Nineteenth Region in Seattle, Washington, issued a complaint against the Union and the Company, the appellees herein, alleging that they had engaged in a number of unfair labor practices under the Act. Prior to the commencement of the hearing thereon, the Union secured from the Board and served upon Ralph Wilmot, the field attorney trying the case on behalf of the Board's General Counsel, a subpena duces tecum.[3/] The subpena required Wilmot to produce: (1) the original

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2/ The relevant portions of the Act and the Board's rules are set forth in an appendix, infra, pp.20-27.

3/ Section 11(1) of the Act requires that the Board, upon the application of any party in an unfair labor practice case, issue subpenas requiring the attendance of witnesses and production of evidence at the hearing. The person subpenaed is then entitled to petition the Board to revoke the subpena, and the Board must revoke it if it finds that the evidence sought is irrelevant, the material subpenaed is not described with sufficient particularity, "or if for any other reason sufficient in law the subpena is otherwise invalid" (29 C.F.R. Sec. 102-31(b).

copies of settlement agreements which counsel for the Company, the Union and some of the charging parties had signed during settlement negotiations which Wilmot and the other parties had conducted on June 21; and (2) a statement based on Wilmot's own files, or the Regional Office files, of the number of telephone calls between Wilmot and the Regional Office on June 21, identifying the persons with whom he had spoken (R. 7).

Wilmot filed a timely petition to revoke the subpena on the ground that the settlement agreement was irrelevant to the proceeding because it had not been approved in writing by the Regional Director, as required by the Board's rules, and so had not become effective (R. 8-9). Attached to the petition was an affidavit by Wilmot stating that under Section 102.118 of the Board's rules (29 C.F.R. Sec. 102.118), [4/] the material subpenaed was under the control of the General Counsel and could be disclosed only when permitted by him, and that the requisite permission had not been granted (R. 10). Counsel for the Union, Richard Donaldson, filed an affidavit in opposition to the petition, asserting that the Union needed the material subpenaed in order to prove that a valid settlement agreement was orally agreed upon during negotiations on June 21 (R. 11-16).

When the unfair labor practice hearing began on October 4, the Trial Examiner presiding, David Doyle, denied Wilmot's petition to revoke the subpena. He ruled that the Union had a right to see the original copies of the settlement agreements "to make sure that they have not been approved in writing" (R. 49), and that the Union had a right to compel Wilmot to testify regarding the latter's telephone calls to the Regional Office on the date of

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4/ The test of this section is set out infra, p. 24-25.

the settlement negotiations to establish that the agreement had been approved orally by the Regional Director (R. 50).

Upon the demand of counsel for the Company and the Union, the Trial Examiner then directed Wilmot to produce the material subpenaed (R. 56-57). Wilmot refused, stating that under Section 102.118 of the Board's rules, he was prohibited from doing so (R. 57). Counsel for the Union then moved that the Trial Examiner dismiss the complaint (R. 58). Wilmot opposed the motion, and asked that he be given an opportunity to seek special permission from the Board to appeal the Examiner's ruling, as provided in Section 102.26 of the Board's rules (R. 59).[5/] The Trial Examiner denied the respondents' motion to dismiss the complaint on the ground that dismissal could "cut off" the charging parties "from any rights they may have," but stated that he would grant an adjournment so that respondents could institute a subpena enforcement

5/ 29 C.F.R. Sec. 102.26. This section states, in relevant part: "Unless expressly authorized by the Rules and Regulations, rulings . . . by the trial examiner on motions . . . on objections, and orders in connection therewith, shall not be appealed directly to the Board except by special permission of the Board, but shall be considered by the Board in reviewing the record. . . . Requests to the Board for special permission to appeal from such rulings of the . . . trial examiner shall be filed promptly, in writing, and shall briefly state the grounds relied on. The moving party shall immediately serve a copy thereof on each other party."

to grant an adjournment to allow Wilmot to take an appeal to the Board because, he said, the Board's rules contemplate immediate recourse to the courts in the event of noncompliance with a Board subpena, and to give counsel for the General Counsel an opportunity to appeal the Examiner's ruling to the Board would be to treat him as a "favored litigant" -- something which the Trial Examiner obviously did not want to do (R. 61).

Counsel for the Union was then asked how much time he wanted to bring a subpena enforcement proceeding in the District Court (R. 62). Mr. Donaldson stated that he would go to the court that afternoon. The Trial Examiner advised him to wait until the next day, however, pointing out that the reporter would need time to prepare the transcript of the hearing that had just been held, and that the transcript of the hearing should be before the District Judge so that the latter could get "the full portence and flavor" of the Examiner's rulings (R. 63). The hearing was then recessed until 2 p.m. the next day (R. 64).

6/ Earlier in the hearing (R. 53), the Trial Examiner quoted in full Section 102.31(d) of the Board's rules, as follows: "On the failure of any person to comply with a subpena issued upon the request of a private party the general counsel shall, in the name of the Board, but on relation of such private party institute proceedings in the appropriate district court for the enforcement thereof unless in the judgment of the Board the enforcement of such subpena will be inconsistent with law and the policies of the act. Neither the general counsel nor the Board shall be deemed thereby to assume responsibility for the effective prosecution of the same before the court." The Trial Examiner then said that he "supposed" that the General Counsel would not institute a subpena enforcement proceeding against his own agent, and expressed the thought that a petition to en-

B. Proceedings in the District Court

On Thursday, October 5, the Company and the Union filed a petition for enforcement of the subpena duces tecum in the District Court, naming Trial Examiner Doyle as the petitioner on their behalf (R. 3-4). Wilmot filed a motion for a continuance on the ground that he was "taking the necessary steps" under Section 102.26 of the Board's rules to appeal the Trial Examiner's order denying his petition to revoke the subpena (R. 1-2). When the hearing convened before Judge von der Heydt that afternoon, counsel for the Union spoke in opposition to the motion for the continuance on the ground that further delay in the unfair labor practice hearing would be costly and inconvenient to the parties (Tr. 5-7). The Court thereupon denied the motion for a continuance, without opinion, and directed that the hearing proceed (Tr. 8).

During the course of the hearing, the sole defense raised by Wilmot was that the petition should be denied on the ground that Section 11(2) of the National Labor Relations Act provides that district courts have jurisdiction to enforce Board subpenas only upon application of the Board, or the General Counsel acting on its behalf (Tr. 13-15).[7/] Since the Board was not the petitioner here, Wilmot pointed out, the complaint should be dismissed.

7/ Section 11(2) states, in relevant part: "In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States . . . within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an

(Cont.)

The Court announced its ruling the next morning (Tr. 20-21). It enforced the subpena and said, with respect to Wilmot's defense, that it did not believe that Congress intended that the General Counsel could bar a private party from compelling the production of evidence he (the private litigant) believes to be necessary. The Court then adjourned.

The unfair labor practice hearing reconvened a half hour later, and Wilmot was again called as a witness and asked to comply with the subpena (R. 70-71). Wilmot refused, however, again stating that he was acting under explicit instructions of the General Counsel (R. 71; Tr. 22). The hearing was thereupon adjourned, and counsel for the Company and the Union secured an order from the District Court directing Wilmot to appear that afternoon and show cause why he should not be held in contempt (R. 68).

At the hearing on the order to show cause, Wilmot was represented by another Board attorney from the Seattle Regional Office, Gordon Byrholdt (Tr. 22). They told the Court that Wilmot's refusal to comply with the Court's order was based on instructions from his superiors (Tr. 22, 28). Byrholdt and counsel for the Company, Donald Burr, explained that they believed the order enforcing the subpena was not appealable, and that in order to get an appealable issue, it was necessary for Wilmot to be adjudicated in contempt of court (Tr. 27-28). Byrholdt stated, "Had we been able to appeal the order this morning, an appeal would have been noted for that time. I fully appreciate that the order was, as Mr. Burr states, interlocutory"

7/(Cont.)

order requiring such person to appear before the Board. . . ." In Section 102.31(d) of its rules, the Board conferred upon the General Counsel the authority to institute subpena enforcement proceedings "in the name of the Board. . . "

(Tr. 28).[8/] Byrholdt asked that whatever order the Court might enter against Wilmot be stayed so that review thereof could be obtained in the Court of Appeals (Tr. 22-23, 26).

The Court thereupon found Wilmot to be in contempt of court and ordered that he be fined $300 per day, payable to the Company and the Union, for each day that he refuses to comply with the order of the Court (R. 71-72; Tr. 29-30). The order, however, was stayed on condition that Wilmot file a notice of appeal by Monday, October 9 (Tr. 29-30). On October 9, notices of appeal were filed from both the order adjudging Wilmot in civil contempt (R. 76) and the order enforcing the subpena (R. 74).

C. Events subsequent to filing of the notices of appeal

On October 27, the Board granted Wilmot's request for special permission to appeal the Trial Examiner's denial of his petition to revoke the subpena. Certified copies of the Board's order have been lodged with the

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8/ The belief of the parties, and apparently of the court below, that the order enforcing the subpena was not a final order and hence not appealable, is erroneous. See Chapman v. Goodman, 219 F. 2d 802, 806 (C.A. 9); Bouscher v. United States, 316 F. 2d 451, 454-456 (C.A. 8); O'Connor v. O'Connell, 253 F. 2d 365 (C.A. 1); Perkins v. Endicott Johnson Corp., 128 F. 2d 208, 226-227 (C.A. 2), aff'd 317 U.S. 501. See also Rule 81(a)(3), F.R.Civ. P. District court orders enforcing Board subpenas have always been directly appealed to the courts of appeals without the necessity of having the person subpenaed incur a contempt citation. See, e.g., Hamilton v. N.L.R.B., 177 F. 2d 676, 677 (C.A. 9); Goodyear Tire & Rubber Co. v. N.L.R.B., 122 F. 2d 450 (C.A. 6); N.L.R.B. v. Friedman, 352 F. 2d 545, 547 (C.A. 3); Link v. N.L.R.B., 330 F. 2d 437 (C.A. 4).

Clerk of the Court

SPECIFICATION OF ERRORS RELIED UPON

1. The District Court erred in ruling that it had jurisdiction to enforce a subpena issued by the National Labor Relations Board, upon the petition of a private party.

2. The Board's General Counsel was an indispensable party to the proceeding, and the District Court erred in directing a subordinate of the General Counsel to produce documents from Board files which the General Counsel, not the subordinate, controls.

ARGUMENT

I. THE ORDERS APPEALED FROM SHOULD BE VACATED AS MOOT, AND THE CASE SHOULD BE REMANDED WITH INSTRUCTIONS TO DISMISS THE PETITION

The District Court concluded that it had jurisdiction to grant appellees' petition for enforcement of a subpena duces tecum issued by the Board and directed to Board Field Attorney Ralph Wilmot. It ordered Wilmot to comply with the subpena and, upon his refusal to do so, adjudged him to be in civil contempt of the Court.

The Board's reversal of the Trial Examiner and revocation of the subpena has mooted any question as to the propriety of the District Court's order of enforcement. The subpena no longer exists. The order enforcing the subpena should therefore be vacated and the case remanded with instructions to dismiss the petition as moot. Oil Workers v. Missouri, 361 U.S. 363; United States v Munsingwear, 340 U.S. 36, 39-40; Local 134, IBEW v. Madden, F. 2d (C.A. 7), 66 LRRM 2046; Graziadei v. United States, 319 F. 2d 913 (C.A. 7); Star Market Co. v. Alpert, 56 LRRM 2638 (C.A. 1);

t. Louis-San Francisco Ry. Co. v. Railroad Yardmasters of America, 347 F. d 983 (C.A. 5); Dulles v. Nathan, 225 F. 2d 29 (C.A.D.C.); Acheson v. Droesse, 97 F. 2d 574 (C.A.D.C.).

By the same token, the order adjudging Wilmot to be in civil contempt f court should also be vacated now that the underlying case is moot. Unlike riminal contempt, which is imposed as punishment for an affront to the dignity f the court, civil contempt is imposed merely to compel action by the re- ondent and is purely remedial in nature. United States v. United Mine Workers, 30 U.S. 258, 294-295. It is settled law that when the order underlying a ivil contempt proceeding has been reversed and vacated on appeal, the contempt djudication must also be vacated since there is no longer any order out- tanding with which the respondent can comply. United States v. United Mine orkers, supra, at 295; Western Fruit Growers, Inc. v. Gotfried, 136 F. 2d 98, 00 (C.A. 9). Hyde Construction Co. v. Koehring Co., 348 F. 2d 643, 647-648 C.A. 3), reversed on other grounds, 382 U.S. 362; In re Door, 195 F. 2d 766, 69 (C.A.D.C.). So here, if the order enforcing the subpena is vacated because f mootness, the Company and the Union are no longer entitled to remedial elief because there is no district court order with which Wilmot can comply. or this reason alone, the order adjudging Wilmot to be in civil contempt of ourt should be vacated and set aside.

In any event, even assuming that mootness of the underlying case s insufficient to warrant vacating Wilmot's contempt adjudication, we submit hat the order adjudging him in civil contempt should be reversed because, s we show below, the court below erred in issuing the order enforcing the bpena. In re Green, 369 U.S. 689, 692; United States v. Thompson, 319 F. 2 665, 667-668 (C.A. 2); Heasly v. United States, 312 F. 2d 641, 648-649

(C.A. 8); Western Fruit Growers, Inc. v. Gotfried, supra.

II. THE DISTRICT COURT LACKED JURISDICTION OVER THE SUBJECT MATTER OF THE ACTION

A. Section 11(2) of the Act authorizes district court enforcement of Board subpenas only upon application of the Board

Section 11(1) of the Act provides that the Board, at the request of any party to proceedings before it, shall issue a subpena requiring the attendance and testimony of witnesses or the production of evidence Section 11(2) further provides that the appropriate United States District Court shall have jurisdiction to issue orders enforcing such subpenas "upon application by the Board." This limited grant of jurisdiction makes clear that the Act contemplates district court enforcement of Board subpenas only upon suit by the Board, and not upon application of private litigants such as the appellees in this case. 9/ The courts have consistently recognized this distinction. Biazevich v. Becker, 161 F. Supp. 261 (S.D. Cal.); N.L.R.B. v. Erkkila, 42 LRRM 2594 (U.S. Dist. Ct., N.D. Cal.); Intertype Corp., Div. of Harris-Intertype Corp. v. Penello, 269 F. Supp. 573, 580-581 (W.D. Va.); Ex-Cell-O Corp. v. Little, 268 F. Supp. 755, 758 (S.D. Ind.); Evans Products Co. v.

9/ The fact that the Union and the Company filed their petition in the name of the Trial Examiner does not alter the status of the proceeding they initiated. Section 102.35 of the Board's rules (29 C.F.R. 102.35), specifically setting forth the powers which the Board has delegated to its Trial Examiners, does not authorize the institution of suits in the district courts on relation of private parties. Nor can Section 102.31(d) (Cont.).

Reynolds, 61 LRRM 2422 (U.S. Dist. Ct., W.D. Tenn.). See also Vapor Blast Mfg. Co. v. Madden, 280 F. 2d 205, 209 (C.A. 7), cert. denied, 364 U.S. 910. If the Board refuses to institute a subpena enforcement proceeding on relation of a private party, then that subpena cannot be enforced.[10/]

This is not to say that a private party is without recourse to the courts from a refusal by the Board to seek enforcement of a subpena on his behalf in an unfair labor practice proceeding. In such a case, if the Board should ultimately issue a final order which aggrieves that party, he may obtain judicial review of the entire unfair labor practice proceeding -- including the Board's action on his subpena -- in the appropriate court of appeals under Section 10(e) or (f) of the Act. If the court should find that

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9/ (Cont.)
of the Board's rules (29 C.F.R. 102.31(d)) be "liberally construed" (R. 19) to permit such action. That section specifically states that ". . . the general counsel shall, in the name of the Board but on relation of such private party, institute proceedings in the appropriate district court" (emphasis added).

10/ The assumption by the Trial Examiner and the court below that the General Counsel, on his own, would refuse to enforce the subpena herein at appellees' request is unjustified. Section 102.31(d) provides that the General Counsel "shall" institute ex rel. proceedings "unless in the judgment of the Board /not the General Counsel/ the enforcement of such subpena would be inconsistent with law and the policies of the Act." No request was ever made by appellees to the General Counsel or the Board to institute an ex rel. proceeding in this case.

the Board committed prejudicial error, the court would deny enforcement of its order and, if appropriate, remand the case to the Board to correct the error made.

Thus, here, the Company and the Union contend that a valid settlement agreement had been entered into with the General Counsel prior to the hearing. When the General Counsel declined to produce the documents which allegedly supported their claim, the Union moved to dismiss the complaint. The Trial Examiner denied the motion. If the Board subsequently affirms the Trial Examiner on this point, finds that the Company and the Union committed the unfair labor practices alleged and issues a final order against them, the propriety of both the General Counsel's refusal to produce the evidence sought and the Trial Examiner's refusal to dismiss the complaint can be reviewed by an appropriate court of appeals before the Board order can be effective. See, e.g., General Engineering, Inc. v. N.L.R.B., 341 F. 2d 367 (C.A. 9); N.L.R.B. v. Seine and Line Fisherman's Union of San Pedro, 374 F. 2d 974 (C.A. 9), cert. denied 66 LRRM 2370.[11/] Accordingly, the fact that appellees could not on their

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11/ In General Engineering, the Board affirmed the Trial Examiner's refusal to revoke a subpena duces tecum which had been served on one of the Board's Regional Directors. On petition to review an order which was subsequently entered against the party requesting the subpena, this Court concluded that the requested documents were not privileged and that the Board erred in revoking the subpena. In remanding the case for further proceedings, the Court observed that while the Board could decline to produce evidence for any reason it chose, it "could not enter an enforceable order if it insists on withholding evidence which, under the rules

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own, secure enforcement of their Board subpena in the District Court does not warrant the conclusion that they would be helpless if the Board refused to seek enforcement thereof.

B. 28 U.S.C. 1337 does not confer jurisdiction upon the District Court in this case

The contention made by appellees in the court below that 28 U.S.C. 1337 provides an alternate basis for the District Court's assertion of jurisdiction over this action is without merit.[12/] That section grants the district courts ". . . original jurisdiction of any civil action or proceeding arising under any act of Congress regulating commerce. . . . " It is well settled, however, that the jurisdiction thus conferred is not unlimited. See, e.g., Boire v. Greyhound Corp., 376 U.S. 473; Teamsters, etc., Local 690 v. N.L.R.B.,

11/(Cont.) of evidence in Federal District Courts, is admissable" (341 F. 2d at 376). In N.L.R.B. v. Seine and Line Fisherman's Union, this Court also found that the Trial Examiner had erred in revoking subpenas duces tecum and ad testificandum directed to Board employees, but concluded that the parties requesting the subpenas had failed to prove that they had been prejudiced by the error; accordingly, the Board's order against them was enforced. For other cases involving appellate review of Board action with regard to subpenas directed to its employees, see Singer Sewing Machine Co. v. N.L.R.B., 329 F. 2d 200 (C.A. 4); Harvey Aluminum v. N.L.R.B., 335 F 2d 749 (C.A. 9) and N.L.R.B. v. Capitol Fish Company, 294 F. 2d 868 (C.A. 5).

12/ The court below did not specify which of the three bases for jurisdiction advanced by the Company and the Union it relief upon in issuing its order

375 F. 2d 966, 968-969 (C.A. 9); Urethane Corp. v. Kennedy, 332 F. 2d 564 (C.A. 9); Department & Specialty Store Employees v. Brown, 284 F. 2d 619 (C.A. 9), cert. denied, 366 U.S. 934. Since, by the terms of a specific law, only the Board is empowered to petition the courts for enforcement of its subpenas, the general grant of jurisdiction established by Section 1337 cannot be relied upon to accomplish the same result at the request of a private party. The limitations and qualifications on subpena enforcement proceedings which Congress imposed when it enacted Section 11(2) of the Act cannot be ignored, as appellees would have the court do, by relying on an unrelated statute. Cf. California Ass'n of Employers v. Bldg. & Const. Trades Council, 178 F. 2d 175, 177 (C.A. 9); Schatte v. I.A.T.S.E., 182 F. 2d 158, 165-166 (C.A. 9), cert. denied, 351 U.S. 950; Friendly Society of Engravers and Sketchmakers v. Calico Engraving Co., 238 F. 2d 521 (C.A. 4); Amazon Cotton Mill Co. v. Textile Workers of America, 167 F. 2d 183, 188 (C.A. 4). See also, Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 51-52; United Aircraft Corp. v. McCulloch, 365 F. 2d 960, 961 (C.A.D.C.); Bokat v. Tidewater Equipment Co., 363 F. 2d 667, 671-672 (C.A. 5). Nothing in Section 1337 permits a litigant before the Board to circumvent the procedure Congress has provided in Section 11(2) of the Act by resorting to an independent equity suit in the district court.

C. 28 U.S.C. 1361 is also inapplicable to this case

28 U.S.C. 1361, which invests the district courts with original jurisdiction of actions "in the nature of mandamus to compel an officer or employee of the United States to perform a duty owed to the plaintiff," is not a proper basis for jurisdiction over this action, since "mandamus may

not ordinarily be resorted to as a mode of review when a statutory method has been provided." Bartsch v. Clarke, 293 F. 2d 283, 285 (C.A. 4). Accord: Whittier v. Emmet, 281 F. 2d 24, 28-29 (C.A.D.C.); Algonquin Gas Transmission Co. v. F.P.C., 201 F. 2d 334, 337-338 (C.A.D.C.). As shown above, the actions of the General Counsel and the Trial Examiner in this case are subject to adequate review under Section 10(e) and (f) of the Act. Mandamus is thus unavailable. Cf. Indiana & Michigan Electric Co. v. F.P.C., 224 F. Supp. 166, 169-170 (N.D. Ind.). In any event, mandamus lies only to compel the performance of ministerial duties, plainly defined by law, rather than those committed to the discretion of a government official. Rural Electrification Administration v. Northern States Power Co., 373 F. 2d 694-695, n. 14 (C.A. 8). The General Counsel's disposition of documents within his control is clearly a matter committed to his discretion, and is reviewable only insofar as the abuse of that discretion may bear upon the enforceability of a final Board order.

III. THE GENERAL COUNSEL WAS AN INDISPENSABLE PARTY TO THE ACTION

By their action against Ralph Wilmot, a Board field attorney, the Company and the Union sought to compel the production of documents from the files of one of the Board's regional offices. Section 3(d) of the Act, however, vests the ultimate authority over the operation of the regional offices in the General Counsel.[13/] The role of the regional office personnel in the maintenanance of files there is entirely ministerial, since Section 102.118 of the Board's Rules and Regulations (29 C.F.R. 102.118) requires

13/ Section 3(d) is set forth, infra, p. 20.

that the General Counsel consent in writing to the production of such documents or the testimony of Board employees in proceedings relating to them. In this case, appellees filed their action in the District Court after the General Counsel had denied their request for his consent. Field Attorney Wilmot stated repeatedly at the hearing before the District Court that he was bound by the explicit instructions of the General Counsel and had no authority to testify or produce the requested documents.

In these circumstances, the General Counsel was an indispensable party to the action, and the District Court erred in not dismissing the petition for that reason. As the Supreme Court has stated, "The superior officer is an indispensable party if the decree sought will require him to take action either by exercising a power lodged in him by law or by having a subordinate exercise it for him." Williams v. Fanning, 332 U.S. 490, 493. See also Vapor Blast Independent Shop Worker's Ass'n v. Simon, 305 F. 2d 717, 719 (C.A. 7); Dombrovskis v. Esperdy, 321 F. 2d 463, 465-466 (C.A. 2); Harris v. Smedile, 302 F. 2d 661 (C.A. 7).[14/]

14/ Cf. United States ex rel. Touhy v. Ragen, 340 U.S. 462. In that case, the Supreme Court held that the Attorney General of the United States could validly prescribe regulations requiring his consent to the production of official documents or other records by his subordinates. In so holding, the court affirmed the Seventh Circuit's finding (United States ex rel. Touhy v. Ragen, 180 F. 2d 321, 323-324), that the United States District Courts had no jurisdiction or power to hold a Justice Department employee in contempt for withholding documents pursuant to the regulations.

CONCLUSION

In sum, the court below had no jurisdiction to entertain the subpena enforcement petition because it was not filed by the Board, and the District Court improperly sought to compel Wilmot to produce the information sought when it was the General Counsel, not he, who had final authority over the Regional Office files. The adjudication of Wilmot in civil contempt must accordingly fall. A decree should issue reversing the judgment below, vacating the orders of the District Court, and remanding the case with instructions to dismiss the petition.

In any event, it is apparent from the record that Wilmot disobeyed the order enforcing the subpena only because he, all the other counsel and the District Judge, were under the mistaken impression that the only way to get an appealable order was for him to be adjudged in contempt of court. Under these circumstances, we request that this Court, in the exercise of its discretion, vacate the order adjudging Wilmot in contempt of court even if the Court should find that the order enforcing the subpena was properly entered.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

SOLOMON I. HIRSH,
WILLIAM H. CARDER,
Attorneys,

National Labor Relations Board.

February 1968

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

Marcel Mallet-Prevost
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, et seq.) are as follows:

/Section 3/ (d) * * * the General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or may be provided by law. * * *

* * * *

Sec. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other agreement, law, or otherwise: * * *

* * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be

served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part of relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set

aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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Sec. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10 --

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days

after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

APPENDIX B

The relevant provisions of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended (29 C.F.R. 102.1, et seq.), are as follows:

Sec. 102.118 Same; Board employees prohibited from producing files records, etc., pursuant to subpoena ad testificandum or subpoena duces tecum; prohibited from testifying in regard thereto. -- No regional director, field examiner, trial examiner, attorney, specially designated agent, general counsel, member of the Board, or other officer or employee of the Board shall produce or present any files, documents, reports, memoranda, or records of the Board or testify in behalf of any party to any cause pending in any court or before the Board, or any other board, commission, or other administrative agency of the United States, or of any State, territory, or the District of Columbia with respect to any information, facts, or other matter coming to his knowledge in his official capacity or with respect to the contents of any files, documents, reports, memoranda, or records of the Board, whether in answer to a subpena, subpoena duces tecum, or otherwise, without the written consent of the Board or the chairman of the Board if the official or document is subject to the supervision or control of the Board; or the general counsel if the official or document is subject to the supervision or control of the general counsel. Whenever any subpoena ad testificandum or subpoena duces tecum, the purpose of which is to adduce testimony or require the production of records as described hereinabove, shall have been served on any such persons or other officer or employee of the Board, he will, unless otherwise expressly directed by the Board or the chairman of the Board or the general counsel, as the case may be, move pursuant to the applicable procedure, whether by petition to revoke,

motion to quash, or otherwise, to have such subpena invalidated on the ground that the evidence sought is privileged against disclosure by this rule: Provided, That after a witness called by the general counsel has testified in a hearing upon a complaint under section 10(c) of the act, the respondent may move for the production of any statement of such witness in possession of the general counsel, if such statement has been reduced to writing and signed or otherwise approved or adopted by the witness. Such motion shall be granted by the trial examiner. If the general counsel declines to furnish the statement, the testimony of the witness shall be stricken: Provided further, That after any witness has testified in any postelection hearing pursuant to section 102.69(d), any party may move for the production of any statement of such witness in possession of any agent of the Board, if such statement has been reduced to writing and signed or otherwise approved by the witness. Such motion shall be granted by the hearing officer.

Sec. 102.26 Motions; rulings and orders part of the record; rulings not to be appealed directly to Board without special permission; requests for special permission to appeal. -- All motions, rulings, and orders shall become part of the record, except that rulings on motions to revoke subpenas shall become a part of the record only upon the request of the party aggrieved thereby, as provided in section 102.31. Unless expressly authorized by the Rules and Regulations, rulings by the regional director and by the trial examiner on motions, by the trial examiner on objections, and orders in connection therewith, shall not be appealed directly to the Board except by special permission of the Board, but shall be considered by the Board in reviewing the record, if exception to the ruling or order is included in the

statement of exceptions filed with the Board, pursuant to section 102.46. Requests to the Board for special permission to appeal from such rulings of the regional director or the trial examiner shall be filed promptly, in writing, and shall briefly state the grounds relied on. The moving party shall immediately serve a copy thereof on each other party.

Sec. 102.31(d) Upon the failure of any person to comply with a subpena issued upon the request of a private party, the general counsel shall, in the name of the Board but on relation of such private party, institute proceedings in the appropriate district court for the enforcement thereof, unless in the judgment of the Board the enforcement of such subpena would be inconsistent with law and with the policies of the act. Neither the general counsel nor the Board shall be deemed thereby to have assumed responsibility for the effective prosecution of the same before the court.